THE HASKIN WOOD VULCANIZING COMPANY v. THE CLEVELAND SHIP BUILDING COMPANY.*

Supreme Court of Appeals: At Richmond.

March 25, 1897.

1. CHANCERY PLEADING—*Multifariousness.* A bill is not multifarious which presents a case where the matters of litigation can be properly embraced in one suit, and the rights of all parties be conveniently settled, and the defendants suffer no prejudice.
2. CORPORATIONS—*Preference to prior existing debt.* In the case at bar the deed of trust made by the appellant corporation was made to secure a debt existing prior to the date of making said deed, and, under the terms of section 1149 of the Code, it inures to the benefit of all creditors of said corporation existing at its date.
3. FIXTURES—*Case at bar—Mechanics' lien.* Where machinery is permanent in its character and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building. Whatever is essential to the purposes for which a building is used will be considered a part thereof, although the connection between them is such that it may be severed without physical or lasting injury to either. In the case at bar the machinery is part of the realty, and the appellee has completed its work thereon according to contract, and has also perfected and recorded its mechanics' lien within the time prescribed by law, and is now entitled to the benefits thereof.
4. CHANCERY PRACTICE—*Mechanics' lien—Decree for sale.* The decree for sale in the case at bar gave the appellee a preferred lien only on that portion of the property to which its mechanics' lien rightly attached, and a lien, together with other creditors, on the property conveyed by the deed of trust of July 31, 1893. It is to be presumed that all the creditors desired a sale, as the record does not show anything to the contrary. Under the circumstances it was proper to sell the property in two parcels.

Appeal from three decrees of the Corporation Court of the city of Alexandria, pronounced June 22, 1894, November 26, 1895, and February 20, 1896, in a suit in chancery wherein the appellee was the complainant, and the appellants were the defendants.

Affirmed.

The bill in this case is in the following words and figures:

"*To the Honorable J. K. M. Norton,*

"*Judge of the Corporation Court of the City of Alexandria:*

"Humbly complaining, your orator, the Cleveland Shipbuilding Company, a corporation incorporated and organized under the laws of the State of Ohio, who

* Reported by M. P. Burks, State Reporter.

sues for itself and all other creditors of the Haskin Wood Vulcanizing Company, of Washington, D. C., respectfully shows unto your Honor:

"That the Haskin Wood Vulcanizing Company of Washington, D. C., is a corporation incorporated and organized under the laws of the State of Virginia, with its principal office located in the city of Alexandria, Va., that the Haskin Wood Vulcanizing Company, of Washington, D. C., is insolvent, and unable to discharge its liabilities; that it is siezed and possessed of real estate and appurtenances thereto, with buildings, improvements, and fixtures thereon, and a large and extensive plant completed on the same, situated in the city of Alexandria, Virginia; that your orator contracted with the said company to furnish and did furnish to it materials and work and labor for and about the erection and construction of the said buildings, improvements, and fixtures, and on said plant, to the extent of thirty-seven thousand, seven hundred and twenty-four dollars and one cent, and that said work and labor was done, and materials furnished as aforesaid, were completed on June 30, 1893; that your orator was paid by the said company prior to that date on account of its claim under the said contract, the sum of seventeen thousand dollars, leaving due to your orator as of June the 30, 1893, the sum of twenty thousand, seven hundred and twenty-four dollars and one cent, on which amount interest is claimed from that date; that on the 28th day of July, 1893, your orator filed in the clerk's office of the Corporation Court of the city of Alexandria, on account and claim of lien, showing the amount and character of the work done and materials furnished, the prices charged therefor, the payment made, and the balance due, verified by its agent, with a statement thereto attached, declaring its intention to claim the benefit of the lien given by section 2475 of the Code, on the property described therein, and on which it claims the lien. A copy of said account and claim of lien, marked Complainant's Exhibit, 'A,' is herewith filed to be read as a part of this bill.

"That your orator has a lien on the property described in the said account and claim of lien for the said sum of twenty thousand seven hundred and twenty-four dollars and one cent, with interest thereon from June 30, 1893, until paid, since July 28, 1893.

"Your orator further shows unto your Honor that the said Haskin Wood Vulcanizing Company of Washington, D. C., on April 1, 1893, executed and delivered a deed conveying the property mentioned therein, and which is the same property mentioned in the said account and claim of lien, to William L. Clarke and Nathaniel Wilson, of Washington, D. C., in trust to secure the payment to the bearer or bearers of one hundred coupon bonds, each for five hundred dollars, executed by the said Haskin Wood Vulcanizing Company, of Washington, D. C., which said deed was duly recorded on April the 12, 1893, in the said clerk's office. A copy of said deed, marked Complainant's Exhibit 'B,' is herewith filed to be read as a part of this bill.

"Your orator has been informed and believes that all of said bonds have been negotiated by the said company, but the legal holders of them are unknown to your orator.

"Your orator further shows unto your Honor that the said Haskin Wood Vulcanizing Company of Washington, D. C., on July 31, 1893, executed and delivered another deed conveying all of its property in the city of Alexandria, Virginia, in trust to secure the payment of a certain promissory note, dated May 29,

1893, made by the said company, for the sum of five thousand dollars, payable ninety days after its date, and endorsed by Theodore L. Holbrook, Levi Woodbury, Clarence F. Norment, E. L. White, and said Nathaniel Wilson and W. L. Clarke, and on which the said company has borrowed money, and also to secure the payment of any other note or notes to be made by the said company not to exceed fifty thousand dollars, and endorsed by the said Holbrook, Woodbury, Clarke, Norment and White, and said deed was duly recorded on August 1, 1893. A copy of said deed, marked Complainant's Exhibit 'C,' is herewith filed to be read as a part of this bill.

"Your orator has been informed and believes that only the one note for five thousand dollars has been made and negotiated by the said company.

"Your orator charges that the deed of trust dated July 31, 1893, is a lien that inures to the benefit ratably of all creditors of the company existing at the time such lien was created under sec. 1149, Code 1887.

"Your orator is advised and charges that the deed aforesaid, dated April 1, 1893, executed by the said Haskin Wood Vulcanizing Company, of Washington, D. C., to secure its coupon bonds aforesaid, is null and void, and consequently no lien upon the property mentioned therein.

"Your orator further shows that the Haskin Wood Vulcanizing Company, of Washington, D. C., has not yet completed its works, and that it will require a large amount—to-wit: the sum of about twenty-five thousand dollars, to do so, and that it is now without resources to enable it to raise money to complete the same; and, until the works are completed, it cannot begin operations in business.

"That all the defendants except the Haskin Wood Vulcanizing Company, of Washington, D. C., are non-residents of the State of Virginia.

"In consideration of the premises and to the end therefore the said Haskins Wood Vulcanizing Company of Washington, D. C., W. L. Clarke, and Nathaniel Wilson, trustees as aforesaid, Theodore L. Holbrook, Levi Woodbury, Clarence F. Norment, E. L. White, and the said William L. Clarke and Nathaniel Wilson may be made parties defendant to this bill and be required to answer the same, an oath to the answer not being required; that the property described in the account and claim of lien aforesaid may be subject by decree of the court to the payment of your orator's claim of twenty thousand, seven hundred and twenty-four dollars and one cent, with interest from June 30, 1893; that the deed dated April 1, 1893, aforesaid, may be declared null and void; that the said Haskins Wood Vulcanizing Company, of Washington, D. C., may disclose and say how many notes have been made and negotiated by it, and secured by the deed dated July 31, 1893, aforesaid, and further disclose and say what are its assets, their character and description, with the estimated value of its real estate, what are its liabilities due and not due, secured and unsecured and their character and description, and also the estimated amount that will be necessary to complete its works; that the said Haskin Wood Vulcanizing Company, of Washington, D. C., may be declared to be insolvent, and that a decree may be pronounced dissolving the said corporation; that if necessary in the progress of this suit, a receiver may be appointed for its property, and an injunction may be awarded, enjoining and restraining said company, its officers and agents from disposing of, making away with, interfering with, and converting its assets and property; that the affairs of said company may be wound up and settled under the orders of this court; that this cause may be

referred to a commissioner in chancery, to ascertain and report upon the matters and things stated in this bill; that an account of the real estate and personal property of the said company, the liens upon the said real estate, their respective amounts and priorities, and all debts now due and owing and to become due and owing, may be taken by him and returned to the court, and that your orator may have such further or other relief as the nature of its case may require.

"And your orator will ever pray, &c."

(Sworn to.)

The defendant demurred to the bill, pleaded the statute of limitations—six months—and answered, denying nearly all the material allegations of the bill. The note for $5,000, secured by the deed of trust of July 31, 1893, was paid off April 2, 1894, about three months after the bill was filed. The evidence, so far as necessary to a clear understanding of the opinion of the court, appears in the opinion.

James R. Caton and *Francis L. Smith*, for the appellants.

M. H. Salloway and *John M. Johnson*, for the appellee.

HARRISON, J., delivered the opinion of the court.

The court is of opinion that the bill in this case is not multifarious, and the demurrer thereto was properly overruled. There is no valid objection to the form of the bill or its scope. It was proper that the matters of litigation embraced by it should be settled in one suit. The rights of the appellant could suffer no prejudice therefrom, and the convenience of all parties was secured thereby. *Bristol Iron & Steel Co.* v. *Thomas*, 93 Va. p. 25, S. E. R. 110.

The court is further of opinion that, under sec. 1149 of the Code, the trust deed of July 31, 1893, inures to the benefit of all the creditors of appellant existing at its date. The language of the statute is, "If any such company create any lien or encumbrance on its works or property for the purpose of giving a preference to one or more creditors of the company over any other creditor or creditors, except to secure a debt contracted, or money borrowed at the time of the creation of the lien or encumbrance, the same shall inure to the benefit, ratably, of all the creditors of the company existing at the time such lien or encumbrance was created."

The deed in question shows on its face that it was given to secure a note executed on the 29th of May, 1893, for money borrowed by the appellant on that day. The deed being given to secure a debt existing prior to the date of the creation of the lien or encumbrance comes plainly within the terms of the statute and inures to the benefit of all the creditors existing at its date.

The court is further of opinion that the contract entered into between appellant and appellee, whereby the latter was to furnish the former certain machinery for its wood vulcanizing works, was substantially and in good faith completed and performed by appellee. The minor deficiencies, as to which it does not clearly appear whether the appellee or appellant was responsible, have been fully compensated for by an allowance for that purpose made by the commissioner in his report. The great mass of evidence on this subject has been carefully read and considered. It would, however, be wholly without profit to attempt to review it within the limits of an opinion. The contention of appellant that the work was not completed according to contract rests chiefly upon the grounds, first, that the person named in the written contract as the one to approve and accept the work did not perform that duty; and, second, that the machinery was not equal to the working pressure provided for in the contract.

It is true that the person named in the contract as the one to finally approve the work before it was accepted and paid for, did not make the necessary test and perform that duty, for the reason, however, that he was absent in Europe and his services could not be secured when needed. It satisfactorily appears, however, that the duty of finally testing the machinery and approving the work of appellee was performed by a thoroughly competent expert selected by the appellant, and that it was well understood by all parties that he was acting in the place of the expert named in the contract, whose services, so far as the record shows, could not be had at all.

The second objection that the machinery was not equal to the pressure provided for in the contract rests upon the ground that the machinery would not bear a pressure equal to that required by the Government in the manufacture of marine boilers for purposes of navigation. The contract does not provide that the Government rule should be adopted in the manufacture of these boilers, and the specifications as to size, thickness of steel, &c., called for by the contract, does not admit of the application of that rule. The evidence shows that the Government rule is adopted in the construction of boilers for purposes of navigation out of superabundant caution, on account of the constant and excessive steam they have to carry, but that the rule is not regarded in the construction of boilers for land or manufacturing purposes. The evidence shows that these boilers are capable of bearing a working pressure as great as that contemplated by the contract, and as great as the dimensions and other specifications contracted for would

with safety admit of; that they were built of the very best material, and are superior to the boilers of the Haskin Vulcanizing Company, of New York, which the contract provided they should be similar to, and that they are equal to a test and working pressure far greater than is required for boilers in a wood vulcanizing manufactory, and are, in all respects, a substantial compliance with the contract.

The court is further of opinion that appellee perfected and recorded its mechanics' lien within the time prescribed by law, and that, under sec. 2475 of the Code, appellee had the right to take out the lien, and is now entitled to its benefits.

The contention that the work done and machinery furnished by appellee is not permanently annexed to the freehold and does not constitute part thereof is not tenable. Appellant was erecting works for vulcanizing wood; the machinery furnished by appellee consisted in part of four enormous steel tanks, one hundred and five feet long and six and a half feet in diameter, the doors to each weighing seven and a half tons, and the whole of such enormous weight that they had to be shipped in parcels and put together on the premises of the appellant. This machinery practically constituted the vulcanizing works. No building was there until these enormous structures had been put together and placed in position on heavy, solid foundations of concrete and brick. The buildings were then erected around this machinery, the whole constituting one structure for the purpose of vulcanizing wood.

The true rule for determining when the machinery and apparatus of a manufactory forms a part of the realty is: That where the machinery is permanent in its character, and essential to the purposes for which the building is occupied, it must be regarded as realty, and passes with the building; and that whatever is essential to the purposes for which the building is used will be considered as a part thereof, although the connection between them is such that it may be severed without physical or lasting injury to either. *Green* v. *Phillips*, 26 Gratt. 752; *Shelton* v. *Ficklin*, 32 Gratt. 727; *Morotock Ins. Co.* v. *Rodefer*, 92 Va. 747. Applying this rule to the case at bar, it is clear that the machinery furnished by appellee constitutes part of the realty and forms the most important part of the structure in question.

The court is further of opinion that there is no valid objection to the decree of sale. Its effect is not, as contended, to give appellee a preferred lien upon all the property of appellant, but only upon that portion of it to which the mechanics' lien rightfully attached, and a lien together with other creditors upon the property conveyed in the

deed of trust of July 31, 1893. It being a general creditors suit in which about one hundred thousand dollars of liens had been audited it is to be presumed, nothing appearing to the contrary, that all the creditors desired a sale, and not, as contended, that the sale was ordered for the satisfaction of appellee's debt alone. It was also proper to sell the property in two parcels, that upon which appellee's preferred mechanics' lien rested in one parcel, and that covered by the deed of July 31, 1893, in another parcel.

Upon a careful consideration of the whole case we find no error to the prejudice of appellant, and the decree appealed from is therefore affirmed. *Affirmed.*

FOR THE EDITOR.—It nowhere appears, either in the opinion of the court, the record, or briefs of counsel, whether the Haskin Wood Vulcanizing Company was chartered by the legislature or by a circuit court, or was a foreign corporation. Upon inquiry, however, we ascertain that it was incorporated by a circuit court under the provisions of section 1145 of the Code. In our opinion this has a very material bearing upon the question decided by the court in the principal case. We are satisfied that section 1149 of the Code which prohibits preferences is confined to corporations chartered by the circuit courts. An examination of the history of the legistation on this subject would seem to make this plain. We have not access to all of the Acts of Assembly prior to 1865, and consequently may not be able to refer to them all.

The first Act authorizing courts to grant charters was an Act passed on the 13th day of February, 1837, and was restricted to companies for manufacturing and mining purposes. About the same time the legislature enacted another statute forbidding preferences by such companies. Acts 1836-'7, p. 79, ch. 84, sec. 17. This latter Act in terms applied only to liens created by "any company for manufacturing or mining." The Act allowing courts to grant charters does not appear in the Code of 1849, and it is therefore presumed was repealed before that date. At all events, if not repealed before that date, and not contained in the Code of 1849, it was thereby repealed. The Act, however, above mentioned forbidding preferences was carried into the Code of 1849, and appears there as section 34 of chapter 57. By an Act approved March 3, 1854, circuit and *county* courts were authorized to grant charters to any five or more persons "who shall be desirous to form a company for the purpose of manufacturing or mining." Acts 1853-'4, ch. 46, p. 32. This Act in express terms applied only to companies for manufacturing or mining. The fifth section of this Act was substantially the same as section 34, chapter 57, of the Code of 1849, except that it not only forbade preferences by such companies, but also contained a provision for the individual responsibility of stockholders to the extent of their shares of stock for all debts due and owing by the company at the time of its dissolution. The first and fourth sections of this Act appear to have been amended by Acts of 1855-'6, p. 33, ch. 36. We have not access to this Act, and consequently cannot say what the amendment was. By an Act approved March 15, 1858, the Acts of March 3, 1854, and March 11, 1856, were amended, and it appears that a

large number of other companies were authorized to incorporate under its provisions, and the power of *county* courts to grant charters was taken away. Acts 1857–'8, ch. 70, p. 54. The provisions of the Act of 1854 as amended by the Act of 1857–'8 appear in the Code of 1860 as sections 4, 5, 6, 7,8, 9 and 10 of chapter 65, under the title "of telegraph companies and other associations." Section 34, chapter 57, of the Code of 1849 is carried into the Code of 1860 as section 34 of chapter 57. By an Act passed February 29, 1867, power was granted to the circuit courts to grant charters of incorporation to "any five or more persons who shall desire to form a company for the conduct of *any enterprise or business which may be lawfully conducted by private individuals.*" This was passed as an amendment to chapter 65 of the Code of 1860 above referred to. Acts 1866–'7, ch. 129, p. 577. By an Act approved March 30, 1871, sections 4, 5, 6, 7, 8, 9 and 10 of chapter 65 and section 34 of chapter 57 of the Code of Virginia (1860) were repealed, and a new Act substituted in the place of the repealed sections. By this Act circuit courts were forbidden to grant charters to companies to construct railroads, turnpikes or canals beyond certain limits, or to establish a bank of circulation. This Act also forbade preferences by companies chartered by the circuit court, and put the same responsibility upon shareholders as was imposed upon them by the Act of 1854. Acts 1870–'1, ch. 277, pp. 367–369. The first section of the last mentioned Act was amended in certain particulars which need not be here noticed by the Acts of 1871–'2, ch. 265, pp. 343–4, and Acts 1872–'3, ch. 113, p. 95.

Up to this time it is perfectly free from doubt that the statute forbidding preferences was limited to corporations chartered by the circuit courts. In 1873 the laws of the State were compiled and published in one volume with the unfortunate title of *Code* of 1873. This was not a revision of the laws of the State, but an attempt to bring them together in one volume. In this volume there is attempted to be comprised in one chapter a large number of statutes bearing upon chartered companies. The marginal references will show from what a great number of Acts this chapter is taken. Some of the provisions of this chapter apply solely to corporations created by the legislature and others to those created by the circuit courts. This is chap. 57 of the Code of 1873. Secs. 59 and following contain the provisions for court charters. Amongst other provisions is sec. 63, forbidding preferences. Sec. 63 is a copy of sec. 5 of the Act approved March 30, 1871, above mentioned. The bringing together of these various statutes into one chapter (57) has led to confusion of thought, and has caused the profession to overlook the fact that that section applied *solely to corporations chartered by the circuit courts.* Sec. 63 was amended by an Act approved in 1874 by which the personal responsibility of stockholders to the extent of their stock was stricken out. Acts 1874, ch. 167. Sec. 59 was further amended in particulars which need not be here mentioned by Acts 1879–80, ch. 110, Acts 1883–4, ch. 97, p. 129. Plainly the bringing together of these separate Acts into one chapter did not give to the separate Acts themselves any greater or other force and effect than they had prior to the time they were brought together. But in 1887 there was a general revision of the laws of the State, and, unfortunately, most of the provisions of chapter 57 of the Code of 1873 were carried into the Code of 1887 as chapter 47. This would lend color to the view that sec. 1149 applies to charters granted by the legislature as well as to those granted by the courts unless the internal evidence

of the chapter itself shows that it was not so intended; but we think that these internal evidences exist, and can be pointed out.

Section 1145 of the Code (1887) provides how charters of incorporation may be granted, &c., by circuit courts. The next succeeding section plainly applies to charters mentioned in sec. 1145. This is too plain to require discussion. Sec. 1147 provides who shall be the officers and directors "of *any such company.*" Sec. 1148 provides what shall be the minimum capital "of *every such company,*" and further provides how *such company* shall recover subscriptions, and what the certificate of stock "in any *such company* shall set forth. The next section is sec. 1149, which prohibits preferences. This section provides how the stock of every *such company* shall be transferred and forbids any *such company* from creating a lien or encumbrance. Sec. 1150 provides what shall be the evidence "of the incorporation of *such company*" and further requires that "a list of all companies so incorporated shall be reported by the Secretary of the Commonwealth to the General Assembly at each regular session." The words "*such company*" in each of the sections referred to plainly refer to the companies mentioned in sec. 1145, which are those chartered by the circuit courts. Many of the provisions referred to in these sections could have no possible reference to a company chartered by the legislature. The provisions would be perfectly useless, and as the same language is used in all the sections referred to and is not elsewhere used, and the marginal references show the Acts from which these sections were taken, it seems plain that sec. 1149 is limited in its effect to companies chartered by the circuit courts. This, too, is in exact accord with the history of the legislation on the subject which has been heretofore given. As a matter of fact we know from one at least of the revisors that it was never intended to extend the provisions of sec. 1149. This could have no effect, it is true, in the interpretation of the statute, but taken in connection with the history of this legislation, and the peculiar phraseology of the sections hereinbefore referred to, it confirms the construction which we have placed upon sec. 1149.

We regret that this note could not appear over the signature of the Editor, but we have more than once heard him express concurrence in the foregoing views, and the principal case was selected by him for publication in this number of the REGISTER chiefly for the purpose of calling attention to the statutes above referred to.

M. P. B.

TAYLOR AND OTHERS v. MAHONEY.*

Supreme Court of Appeals: At Richmond.

April 8, 1897.

1. TRUST DEEDS—*Fraudulent per se—Selling in course of trade—Failure to provide for a sale on request.* A provision in a deed of trust on a stock of goods to secure creditors which authorizes the trustee to dispose of the stock in due course of trade does not render the deed fraudulent on its face, nor is the deed rendered void by a failure to provide in express terms for a sale by the

*Reported by M. P. Burks, State Reporter.